



STATE OF CALIFORNIA

GAVIN NEWSOM, Governor

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

FILED

02/16/23

02:46 PM

R1103012

February 16, 2023

Agenda ID #21379
Ratesetting

TO PARTIES OF RECORD IN RULEMAKING 11-03-012:

This is the proposed decision of Administrative Law Judge Brian Stevens. Until and unless the Commission hears the item and votes to approve it, the proposed decision has no legal effect. This item may be heard, at the earliest, at the Commission's April 6, 2023 Business Meeting. To confirm when the item will be heard, please see the Business Meeting agenda, which is posted on the Commission's website 10 days before each Business Meeting.

Parties to the proceeding may file comments on the proposed decision as provided in Rule 14.3 of the Commission's Rules of Practice and Procedure (Rules).

The Commission may hold a Ratesetting Deliberative Meeting to consider this item in closed session in advance of the Business Meeting at which the item will be heard. In such event, notice of the Ratesetting Deliberative Meeting will appear in the Daily Calendar, which is posted on the Commission's website. If a Ratesetting Deliberative Meeting is scheduled, *ex parte* communications are prohibited pursuant to Rule 8.2(c)(4).

/s/ MICHELLE COOKE

Michelle Cooke

Acting Chief Administrative Law Judge

MLC:nd3

Attachment

Decision PROPOSED DECISION OF ALJ STEVENS (Mailed 2/16/2023)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to
Address Utility Cost and Revenue
Issues Associated with Greenhouse
Gas Emissions.

Rulemaking 11-03-012

**DECISION DENYING AIRGAS USA, LLC
PETITION FOR MODIFICATION AND CLOSING PROCEEDING**

Summary

This decision denies the petition for modification of Airgas USA, LLC. The proceeding is closed.

1. Procedural Background

On December 1, 2017, Airgas USA, LLC (Airgas or Petitioner) filed a Petition for Modification of Decision (D.) 14-12-037 (PFM). No party filed a response. On March 27, 2018, the assigned Administrative Law Judge (ALJ) convened a prehearing conference to discuss various matters regarding the proceeding.

2. Factual Background

The California Public Utilities Commission (Commission) opened Rulemaking (R.) 11-03-012 to address issues relating to the California Air Resources Board (CARB) administration of the Cap-and-Trade program and

Public Utilities (Pub. Util.) Code Section 748.5.¹ Under this program, CARB grants the state's electric investor-owned utilities (IOUs) an allocation of greenhouse gas (GHG) allowances, which the IOUs sell in quarterly allowance auctions. Under R.11-03-012, the Commission adopted a framework regarding how to distribute allowance proceeds for the sole benefit of their retail ratepayers.

D.12-12-033 adopted a preliminary framework, and D.14-12-037 finalized a distribution methodology and adopted a nomenclature for the proceeds, California Industry Assistance Credits (CIAC), as prescribed in Appendix A of D.14-12-037. In addition to direct allocation of allowances to the electricity sector, CARB allocated allowances to certain industrial facilities to address emissions leakage risk. CARB determines emission leakage risk by evaluating whether an industry is emissions-intensive and trade-exposed (EITE). Facilities understood to be EITE in common usage are more formally referred to in the Cap-and-Trade regulation as "Industrial Covered Entities" that qualify for "Industry Assistance." Under the adopted framework, electric utility GHG allowance revenues are to be directly returned to EITE entities.²

3. Petition for Modification

Through its PFM, Airgas seeks clarification that the methodologies adopted in D.14-12-037 relating to new and transitional facilities apply to its air

¹ Each GHG allowance is a tradable permit representing one metric ton of carbon dioxide equivalent gas. Section 748.5 requires the Commission to provide a direct return of electric utility allowance revenue to residential, "small business," and "emissions-intensive and trade-exposed" entities.

² As defined in D.12-12-033, "emissions-intensive and trade-exposed" means those industrial entities eligible for industry assistance under Cap-and-Trade regulation. (See D.12-12-033 Finding of Fact 63, Conclusion of Law (COL) 2, and COL 13; see also 17 California Code of Regulations § 95879 *et seq.*)

separation unit facility in Etiwanda, California. As explained in D.14-12-037, CARB's direct emissions methodology provides for adjustment to the baseline used to calculate the allowance allocation for new entrants or facilities with "transitional" or varying emissions data.³ A facility's "transitional" emissions are those that are more than 10 percent higher than the average of its emissions from the prior two years. Facilities with stable emissions are those where this difference is less than 10 percent.⁴ Petitioner sought that:

the Commission reopen the proceeding in order to (1) authorize the Energy Division to use the utility's electricity usage data to adjust CIAC baselines for new facilities and facilities with transitional emissions data; (2) clarify that the rules for these facilities apply to Airgas's Etiwanda facility; (3) direct the Energy Division to recalculate and disburse Etiwanda's 2013-2017 CIAC revenues using the modified baseline; and (4) otherwise provide flexibility to the Energy Division as necessary to address data interpretation questions in implementing the CIAC.⁵

The specific language of D.14-12-037 that Petitioner seeks to modify is outlined in Attachment B of the PFM. It is not apparent how this proposed modified language aligns with the relief sought in the PFM.

4. Legal Standard for Review of PFM

Pub. Util. Code Section 1708 grants the Commission authority to "rescind, alter, or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision." To make any changes to a

³ D.14-12-037 at 49.

⁴ D.14-12-037 at 49.

⁵ Petition for Modification of Airgas of D.14-12-037 at 9.

decision or order, the Commission must provide proper notice to the parties and an opportunity to be heard.⁶

We note that modifying an existing decision is an extraordinary remedy that must be exercised with care to keep with the principles of *res judicata* given that “[s]ection 1708 represents a departure from the standard that settled expectations should be allowed to stand undisturbed.”⁷

Rule 16.4 of the Commission’s Rules of Practice and Procedure (Rules) governs the filing of PFMs. Rule 16.4 contains both procedural and substantive requirements.

Rule 16.4(b) states that:

Any factual allegations must be supported with specific citations to the record in the proceeding or to matters that may be officially noticed. Allegations of new or changed facts must be supported by an appropriate declaration or affidavit.

The requirements of the Rule 16.4(d) provide specific instruction to petitioners:

Except as provided in this subsection, a petition for modification must be filed and served within one year of the effective date of the decision proposed to be modified. If more than one year has elapsed, the petition must also explain why the petition could not have been presented within one year of the effective date of the decision. If the Commission determines that the late submission has not been justified, it may on that ground issue a summary denial of the petition.

5. Discussion

Petitioner asserts that it did not bring its PFM within a year of the issuance of D.14-12-037 because the “issues that are the subject of this Petition were

⁶ Pub. Util. Code § 1708.

⁷ 4 CPUC 2d 139, 149-150 (1980); *see also* D.15-05-004.

unknown until the initial CIAC allocation was made in 2016, and it follows that this Petition could not be filed within the one year time limit. New facts provided in this Petition are supported, as required by Rule 16.4(b), by the Declaration of Larry Rosson, attached as Attachment A.”⁸

The PFM does not provide a citation to the relevant information regarding the CIAC allocation in the record of the proceeding nor a matter that may be officially noticed. This includes information that would form the basis of determining the precise date that the relevant information could have been made available to the petitioner. Additionally, the declaration of Larry Rosson does not support the factual basis that Airgas could not have been aware of the basis for which it filed the PFM within one year of the issuance of D.14-12-037.

One of the Commission’s policy initiatives is to, “[ensure] a decision-making process that is impartial, consistent, and transparent, maintains integrity at all levels and is consistent with the law.”⁹

Petitioner has not established the factual basis that supports that it could not have filed the PFM within one year of December 18, 2014. Late submission has not been justified.

6. Conclusion

Given these facts, the Petitioner’s delayed filing is not justified, and we determine that a summary denial of the Petition is appropriate. There are no remaining issues to resolve in this proceeding, and the proceeding shall be closed.

⁸ Petition for Modification of Airgas of D.14-12-037 at 9.

⁹ https://www.cpuc.ca.gov/-/media/cpuc-website/files/uploadedfiles/cpuc_public_website/content/about_us/mission_and_values/strategic-directives-and-governance-policies.pdf.

7. Comments on Proposed Decision

The proposed decision of ALJ Brian Stevens in this matter was mailed to the parties in accordance with Pub. Util. Code Section 311 and comments were allowed under Rule 14.3. Comments were filed on _____, and reply comments were filed on _____ by _____.

8. Assignment of Proceeding

Darcie L. Houck is the assigned Commissioner and Brian Stevens is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The Commission opened R.11-03-012 to address issues relating to the CARB administration of the Cap-and-Trade program and Pub. Util. Code Section 748.5.
2. CARB grants the state's IOUs an allocation of GHG allowances, which the IOUs sell in quarterly allowance auctions.
3. In R.11-03-012, the Commission adopted a framework regarding how to distribute allowance proceeds for the sole benefit of their retail ratepayers.
4. D.12-12-033 adopted a preliminary framework, and D.14-12-037 finalized a distribution methodology and adopted a nomenclature for the proceeds, CIAC, as prescribed in Appendix A of D.14-12-037.
5. D.14-12-037 was issued on December 18, 2014.
6. On December 1, 2017, Petitioner filed a PFM of D.14-12-037.
7. Petitioner does not substantiate through citation nor an appropriate declaration nor affidavit that it could not have presented the PFM within one year of the effective date of the decision.

Conclusions of Law

1. Rule 16.4 governs the filing of petitions for modification.

2. Rule 16.4(b) states:

Any factual allegations must be supported with specific citations to the record in the proceeding or to matters that may be officially noticed. Allegations of new or changed facts must be supported by an appropriate declaration or affidavit.

3. Rule 16.4(d) states:

Except as provided in this subsection, a petition for modification must be filed and served within one year of the effective date of the decision proposed to be modified. If more than one year has elapsed, the petition must also explain why the petition could not have been presented within one year of the effective date of the decision. If the Commission determines that the late submission has not been justified, it may on that ground issue a summary denial of the petition.

4. Petitioner's justification for the delayed filing does not meet the requirements of Rule 16.4.

O R D E R

IT IS ORDERED that:

1. The Petition for Modification of Airgas USA, LLC of Decision 14-12-037 is denied.

2. Rulemaking 11-03-012 is closed.

This order is effective today.

Dated _____, at San Francisco, California.